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AUTHOR Rhode, Deborah L.

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ABSTRACT

Most educational reform cases proceed as class actions in which there is no single aggrieved plaintiff with clearly identifiable views, but rather an aggregation of individuals, often with conflicting preferences. This paper explores the problems presented in educational reform class actions where plaintiffs disagree over the remedial objectives of the suit. Relying on reported decisions, interviews, and case histories, the paper first examines the conflicts that have surfaced within plaintiff classes, such as disputes over busing, mainstreaming, and deinstitutionalization. Discussion then focuses on the inadequacies of the existing procedural mechanisms for coping with such conflicts. Of particular concern are information and incentive structures that prevent courts, counsel, and litigants from addressing or accommodating the full range of class interests. The paper concludes by distinguishing problems that may be susceptible to procedural reform from those that are endemic to any pluralist or majority decision-making process. (Author/MLF)

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CONFLICTS OF INTEREST IN EDUCATIONAL REFORM LITIGATION

Deborah L. Rhode*

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*Deborah L. Rhode is Assistant Professor of Law, Stanford Law School.

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Abstract

This paper explores the problems presented in educational reform class actions where plaintiffs disagree over the remedial objectives of the suit. Relying on reported decisions, interviews, and case histories, the paper first examines the conflicts that have surfaced within plaintiff classes, such as disputes over busing, mainstreaming, and de-institutionalization. Discussion then focuses on the inadequacies of existing procedural mechanisms for coping with such conflicts. Of particular concern are information and incentive structures that prevent courts, counsel, and litigants from addressing or accommodating the full range of class interests. The paper concludes by distinguishing problems that may be susceptible to procedural reform from those that are endemic to any pluralist or majoritarian decision-making process.

Over the last quarter-century, courts have become an increasingly significant force in shaping educational institutions. Opposition to this judicial involvement has never been lacking, but it has changed markedly in tone and direction during the last decade. The shrill and avowedly racist outcries that greeted the first desegregation decrees have largely given way to more muted and reflective skepticism about the institutional competence and accountability of courts in superintending educational policy. (1) This essay addresses one of the primary targets of recent critics, the procedures through which education issues reach the courts.

Most "educational reform" cases--lawsuits seeking structural change in school programs, policies or racial composition--proceed as class actions. In such cases, there is no single aggrieved plaintiff with clearly identifiable views, but rather an aggregation of individuals, often with unstable, inchoate or conflicting preferences. As in other institutional reform adjudication involving prisons, mental hospitals and employment programs, those alleging unconstitutional conduct will rarely be of one view as to what should be done about it. And there is comparable dissension among courts, commentators, and counsel over how to identify and resolve such conflicts.

The following discussion evaluates existing procedural mechanisms for coping with intra-class conflicts in educational reform litigation. Although the focus is on suits challenging racial segregation and institutional programs for the disabled, the problems arising in these cases are representative of those presented in other educational and civil rights contexts.

In exploring these problems, this essay takes one central proposition for granted. On the whole, educational reform class actions have made and continue to make an enormous contribution to the realization of fundamental constitutional values--a contribution that no other governmental construct has proved able to duplicate. That contention has been defended at length elsewhere, and the arguments need not be recounted here. (2) Thus, the following discussion should not be taken to suggest that education class actions are misused or misconceived; I perceive no preferable alternative. (3) Rather, my intent is to examine problems in existing procedures, with two central objectives. The first is to explore the extent to which such problems flow from intractable difficulties in designing representative structures for virtually any decision-making process. A second, and related endeavor is to identify structural deficiencies unique to class adjudication that might be amenable to improvement.

Analysis of these deficiencies proceeds in three phases. Part I is largely descriptive. Relying on reported decisions, case histories and personal interviews with plaintiff civil rights attorneys, it first reviews the range of conflicts that have surfaced in educational reform litigation. (4) Discussion then focuses on how existing procedural rules respond to such conflicts, why compliance is important, and, in particular, why it matters whether the full range of class sentiment is disclosed. Part II explores, from the perspective of each participant, the information and incentive barriers that militate against such disclosure. Part III examines the procedural devices designed to cope with class schisms that are in fact exposed. A fourth and final section analyzes the merits and limitations of certain reform strategies that might improve courts' responsiveness to the full range of class concerns.

I. Intra-Class Conflicts and Disclosure Obligations

A. A Typology of Conflicts

For those seeking educational reforms, class actions afford a number of obvious procedural advantages over single-plaintiff suits. By definition, class litigation focuses on institutional practices rather than individual grievances. If a variety of allegedly unconstitutional practices are at issue, it can be cumbersome to seek out separate plaintiffs who will have standing to challenge each violation. Representing individual plaintiffs also entails some risks of mootness. School children graduate, and those alleging special educational needs may have their individual objectives satisfied during the pendancy of litigation. However, once the court certifies the suit as a class action, the mootness of individual claims will not terminate the proceedings, and any settlement must obtain judicial approval. (5) Thus, class representation obviates the need continually to substitute plaintiffs, and minimizes the allure of proposed settlements that would benefit only named litigants.

Yet by the same token, class status can also generate substantial problems in accommodating divergent client interests. The intensity and incidence of such conflicts in school litigation is difficult to gauge, given the absence of any systematic empirical research on the issue. However, the range of reported disputes is somewhat suggestive of the importance and frequency of the problem.

Antagonism within a class can arise at any stage of litigation. Those who prefer the certainty of the status quo to the risks of

judicial rearrangement will oppose litigation from the outset.(6) Some parents, who anticipate busing or closure of institutional facilities as a likely consequence of legal challenge, might prefer never to initiate proceedings. Far more common, however, are schisms that develop during settlement negotiations or the remedial phase of litigation. Often when a suit is filed, neither the parties nor their attorneys have focused on issues of relief. The impetus for the suit will be a general sense that rights have been infringed or needs ignored, rather than a shared conviction about what specifically should be done about it. Thus, there may be consensus only on relatively abstract questions--that ghetto schools are bad, or special education programs inadequate. During the liability phase of litigation, class members may be insufficiently informed or interested to participate in decision-making. However, once it becomes clear that some relief will be forthcoming, sharp divisions in preferences frequently emerge.

School desegregation cases provide the most well-documented instances of conflict. Derek Bell, Curtis Berger, and Stephen Yeazell have described in some detail the balkanization within minority communities in Boston, Atlanta, Detroit, New York, and Los Angeles over fundamental questions of educational policy.(7) Dispute has centered on the relative importance of integration, financial resources, minority control, and ethnic identification in enriching school environments. Constituencies that support integration in principle have disagreed over its value in particular settings where extended bus rides, racial tension, or white flight seem likely concomitants of judicial redistricting. Some black administrators, teachers, and local organization leaders have objected to interdistrict remedies that would

close minority schools or dilute minority control. (8) Similarly, Chicano groups have opposed desegregation efforts that could undermine barrio solidarity. (9) Even class members who accept the necessity of some busing will often divide on the merits of particular plans. Many black parents in Norwalk, Conn., were displeased with NAACP proposals calling for more transportation of minority than white students, while in the Coney Island school case, class members disputed the desirability of various busing plus magnet-school alternatives. (10)

Comparable cleavages arise in other education contexts. Parents challenging the adequacy of existing bilingual or special remedial programs have disagreed over whether mainstreaming or upgrading separate classes represents the better solution. In suits against the Pennhurst, Pa., and Willowbrook, N.Y., schools for the retarded and the California School for the Blind, plaintiff families divided over whether to demand improvements in the institutions or press for creation of community-care alternatives. (11)

Moreover, as with any form of collective litigation, parties often differ in their assessment of settlement offers. Given the uncertainty of outcome and indeterminancy of relief available in many civil rights actions, risk-averse plaintiffs will often be willing to make substantial concessions. Other class members will prefer to fight, if not to the death, at least until the Supreme Court denies certiorari. And, as the following discussion suggests, doctrinal responses to such conflict have not been altogether instructive.

B. The Requirement of Adequate Representation

Most civil rights actions seeking injunctive relief proceed under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which authorizes class status where the opposing party has acted or refused to act on grounds "generally applicable to the class as a whole." Among other things, the Rule requires that "the representative parties will fairly and adequately protect the interests of the class." If a court finds all procedural requirements satisfied, and certifies a class, its members will be bound by the judgment; they have no right to opt out of the action or even to receive notice of its pendency, although the court may order notice at its own discretion, and must do so before approving any pretrial settlement. (12)

Given the binding consequences that attach to class status, Rule 23's mandate of adequate representation is of constitutional dimensions. In essence, this requirement embodies a fundamental tenet of due process: that judicial procedure fairly protect "the interest of absent parties who are to be bound by it."(13) Yet despite the centrality of the representation concept to class action theory and practice, judicial pronouncements on the subject have been notably unilluminating.

The Advisory Committee that drafted Rule 23 provided no amplification of the term "adequately protect" or "interests",(14) and judges applying the standard have done little to fill the lacunae. Among the primary questions left unaddressed is whether interest ever means more than preference and, if so, when, and what. Must the named representative and counsel serve primarily as "instructed delegates,"(15) pursuing objectives to which a majority of class

members have subscribed? If so, how are those objectives to be identified, particularly if the class comprises a diffuse and changing constituency of past, present and future members? Alternatively, is the representative role more that of a "Burkean trustee," who makes an independent assessment of class concerns?(16) Under that advocacy model, what recourse is available to individuals who do not share their trustee's vision?

These issues, addressed at some length in Parts III and IV, are easily elided under prevailing doctrine. By contrast to much political theory, which suffers from an "embarrassment of riches"(17) in defining representation, judicial analysis seems impoverished in both concept and application. The long-standing theoretical debate over how much paternalism a representative is entitled to exercise receives almost no attention in reported cases. In general, the courts have insisted only that attorneys be competent and that the claims of the named representatives be "similar", "common", or "not antagonistic" to those of the membership generally.(18) Even where there is demonstrable polarization among the membership, courts frequently grant class status.

For example, in Evans v. Buchanan,(19) a federal district judge rejected the claim that named plaintiffs in a school desegregation case inadequately represented class members who favored different relief. In the court's view, the interests of the entire class were "coextensive", in that all desired an end to segregative state action and "relatively broad remedies." Since any judicial decree would "of necessity . . . be determinative of the rights of all, the question is really not the antagonism of interests but whether the court has had a full and fair presentation of all possible views on the matter."

Through party and amici submissions, the court felt that it had been "thoroughly informed of the differing views." Whether, from a dissenter's view, amici status is a sufficient safeguard will be discussed more fully below. The point here is simply that courts have not generally construed certification standards to require consensus on the named representative's objectives.

On balance, that is a desirable result. Certification issues arise at the outset of proceedings, when the range or intensity of conflicts is difficult to predict. Delays in resolving class status would impede negotiations and impair preparation by named parties. Moreover, to deny class certification whenever a substantial number of members may have diverging remedial preferences would often preempt use of a valuable device without improving adjudicative processes. Most lawsuits now proceeding as class actions could be brought as personal claims. If, in individual suits, the named plaintiffs establish unconstitutional conduct warranting institutional relief, a court must so declare; the breadth of remedy will depend on the "scope of violation",(20) not the number of names in the caption of the complaint. Prevailing doctrine entitles a single school child who proves intentional district-wide segregation to seek dismantling of the entire dual school system.(21) Similarly, one institutionalized child who establishes constitutional or statutory violations might obtain the same injunctive relief whether or not his suit was cast as a class action.(22) In such cases, those who disagree with named plaintiffs' remedial proposals may have even less opportunity for notice and participation if the case proceeds as an individual rather than collective action. Thus, denial of class certification hardly secures, and may even impede, full protection of all interests affected by

judicial decree. From a due process perspective, the preferable strategy for most conflicts is to grant class status and create sufficient institutional safeguards to insure disclosure of dissenting views.

C. Disclosure Mandates and Process Values

On one level, the rationale for requiring disclosure of class preferences seems so obvious as to require no further elaboration. In a legal culture that places such an extraordinary premium on client autonomy and procedural values, class members' right to have their concerns counted appears almost axiomatic. Yet on closer scrutiny, a number of sticky questions arise.

Whatever our rhetorical posturings, our adjudicative structures by no means contemplate a hearing for all interests implicated by a given decree. In much litigation brought by single individuals, Bakke v. California Board of Regents(23) being an obvious example, the plaintiff will not adequately represent the views of all individuals affected by the judgment. To be sure, those individuals, unlike class members, will not be bound directly by the court's decree and can challenge application of a prior decision to their own circumstances. But given the force of stare decisis, the practical consequences for unrepresented constituencies are often the same, whether or not they are part of a certified class.

Moreover, insofar as courts perceive their decisions to be dictated by applicable legal principles and underlying policies, the remedial preferences of present or future litigants may be of relatively little significance. Had Bakke been brought as a class

action, it is unlikely that plaintiffs' evaluations of various affirmative action plans would have significantly affected the Court's judgment. Thus, two fundamental threshold inquiries are why disclosure of conflicting preferences matters and whether it matters more in class actions than private adjudication.

Apprising the court of class preferences can enhance both the rationality and legitimacy of decision-making. Full disclosure reduces the chance that courts will overlook, undervalue, or otherwise misconstrue relevant considerations. (24) Parties who believe that their perspectives have been fairly presented may also display more confidence in the judicial process and greater willingness to abide by its result. (25) To be sure, those same rationality and participatory values are equally implicated in much private litigation, as the involvement of intervenors and amici curiae frequently attests. However, sensitivity to such values is of particular importance in educational reform cases, less because of their class character than because of other structural features. Such litigation tends to involve complex indeterminate remedies, fundamental personal values, non-apparent preferences, and politically vulnerable forms of intervention, all of which counsel special concern.

As noted previously, the civil rights violations in most education reform cases do not point to any single remedial solution. Typically, the final decree will reflect at least some choices as to which prevailing doctrine is largely indifferent. Unlike the relief questions presented by Bakke, many technical aspects of school litigation decrees implicate no significant legal principles or public policies. On those matters, litigant preferences will at times provide

a sensible decision-rule. Of course, in many instances, to be amplified at length below, those desires will not be controlling; concerns about future class members and the ultimate efficacy of a remedial decree may mandate a different course. But even if their views are not dispositive, class members have a strong stake in seeing their preferences put forward on matters of considerable personal significance. And insofar as a judge is prepared to accommodate party concerns, he should have access to the full range of class sentiment.

Frequently that sentiment will not be self-revealing. The nature of relief available in much educational reform litigation creates opportunities for dispute less easily identified than in other class actions or individual suits. Where the claim is for monetary damages alone, the interests of various plaintiff subgroups are readily apparent. An adequate working assumption is that for any such faction, more compensation is better than less. When remedial choices involve complex forms of injunctive relief, with many opportunities for tradeoffs among subgroups within a plaintiff class, prediction becomes far more difficult. As the litigation discussed in Part III suggests, courts and counsel often have failed to appreciate the nature and intensity of class concerns until after a settlement was reached or a decree entered.

That sort of failure is troubling in several respects. Most obviously, it can increase the expense and delay of proceedings, if disaffected parties belatedly appeal the adequacy of their representation and the court's decree. A more fundamental problem is that misperceptions about party preferences may unnecessarily compromise the legitimacy of advocacy structures in general, as well as the success of judicial intervention in particular educational reform cases.

In both concept and implementation, all systems of representation demand some measure of consent. As political theorists since Burke have argued, no governance structure dependent on representative relationships can have a "long or sure existence" without some grounding in constituent support. (26) Largely for that reason constitutional law is, in John Hart Ely's phrase, "overwhelmingly concerned . . . with ensuring broad participation in the processes and distributions of government."(27) The need for a consensual foundation is especially pronounced when non-elected or self-appointed advocates arrogate seemingly legislative or administrative decision-making roles. To restructure a school district effectively, or assure adequate programs for retarded children, often requires considerable cooperation from the affected constituencies. Yet the further the judge strays into social planning provinces, the greater his difficulty in commanding the moral force of adjudication. (28)

Doubts concerning the courts' institutional competence to manage educational reform disputes have surfaced with increasing frequency over the last decade. That skepticism now threatens to take tangible form in legislative restraints on the courts' jurisdiction and remedial authority in civil rights cases. (29) Judges' inability to assess and accommodate class preferences cannot help but erode political support among constituencies who should be most favorably disposed toward judicial intervention. In cases where the court's legitimacy, and indeed jurisdiction, are so much at risk, disclosing plaintiff sentiment is of particular importance. What is disturbing about current class action structures is that, all too frequently, none of the participants has sufficient incentive or information to insure such disclosure.

II. The Participants' Roles in Disclosing Conflict: Rules and Realities

A. The Named Plaintiffs

As federal courts frequently have emphasized, "class actions involve the delegation of authority to a named representative to pursue a common goal. In this pursuit, it is . . . the duty of the class representative to ensure that the absent members' interests are adequately protected. . . ."(30) As a practical matter, however, once a class attains certification, named plaintiffs generally are not highly motivated or well-situated to monitor the congruence between counsel's conduct and class preferences.

Although nominal parties' involvement and ideological stake in civil rights litigation varies considerably, such individuals rarely have any incentive to rise above parochialism when speaking for their constituents. Why should named representatives make special efforts to expose conflict that could result in delay, expense, or impairment of their own litigation objectives? Families who favor home and community-care facilities for their retarded relatives have little reason to ferret out the views of those who may prefer institutionalization. At best, the named plaintiffs may attempt to see that counsel is pursuing their own interests, and that any proposed settlement comports with their remedial preferences; the objectives of fellow litigants could well remain uncertain and unarticulated.

Moreover, since counsel owes his duty to the class as a whole, the litigation directives of named plaintiffs are not of controlling

significance. (31) And in any event, many nominal representatives are paper organizations or individuals who lack the expertise, organization, and resources to play a meaningful role in formulating such directives. Educational reform cases in general and school desegregation actions in particular provide ample illustrations of plaintiffs who had virtually no communication with their attorney or each other. (32) Particularly where the class membership is diffuse, the issues complicated, or the proceedings protracted, the function of nominal plaintiffs may be no more than what the label implies. Since, as one federal court candidly acknowledged, "it is counsel . . . not the named parties, who direct and manage these actions," (33) his role in exposing conflicts is of central importance.

C. Class Counsel

A familiar refrain among courts and commentators is that attorneys assume special responsibilities in class litigation. According to one court of appeals, the duty to insure adequate representation rests "primarily on counsel [for] in addition to the normal obligations of an officer of the court and . . . counsel to parties of the litigation, class action counsel possess, in a very real sense, fiduciary obligations to those not before the court." (34) Principal among those duties is the responsibility to "discuss the range of interests held by class members [and] . . . to report conflicts of interest . . . to the judge so that he can consider whether disaggregation of the class is necessary for adequate representation." (35)

Although unobjectionable in concept, that role definition has frequently proved unworkable in practice. To be sure, many attorneys make extraordinary efforts to appreciate and accommodate the broadest possible spectrum of class sentiment. Particularly where conflicts are likely to come to the court's attention through other sources, counsel will sometimes find it prudent to broach the issue first. His demonstrated sensitivity to dissension may persuade the court that formal involvement of other attorney representatives is unnecessary, and that some form of notice and opportunity to be heard for class members will suffice. Of course, these are precisely the circumstances in which an activist role for class counsel is least needed, since by hypothesis the court would have learned of the conflict through other sources. And, absent preemptive action by class counsel, those sources might in some cases have been able to provide a fuller record on the merits of separate representation. Moreover, where the range and intensity of divergent preferences within the class would be unlikely to surface without counsel's assistance, he will often have strong prudential and ideological reasons not to provide it. One need not be a raving realist to suppose that such motivations play a more dominant role in shaping attorneys' conduct than Rule 23's injunctions and accompanying judicial gloss.

1. Prudential Concerns

A lawyer active in educational reform litigation is subject to a variety of financial, tactical, and professional pressures that constrain his response to class conflicts. To be sure, none of these constraints are unique to this form of practice. And, of course, the intensity of such pressures will vary considerably depending, inter

alia, on the sources of funding and organizational support for particular cases. Nonetheless, it is appropriate to identify, in generic form, the range of prudential concerns that can inform counsel's management of intra-class disputes.

The most patent of these concerns arise from the financial underpinnings of educational reform litigation. Under various federal civil rights statutes, a trial court may grant counsel fees to prevailing parties. (36) Among the factors affecting the attorney's net award is the amount of the class's recovery, the costs of obtaining it, and the number of attorneys entitled to a share. Given the expense and the marginal budget on which many litigators operate, few can remain impervious to all worldly concerns. And flushing out dissension among class members can be costly in several respects.

In many instances, opposing parties will seek to capitalize on class dissension by filing motions for decertification. If successful, counsel could lose a substantial investment in time and resources that he cannot, as a practical matter, recoup from former class members. At a minimum, such motions may result in expense, delay and loss of bargaining leverage, while deflecting attention from trial preparation. They might also trigger involvement of additional lawyers, who share the limelight, the control over litigation decisions and, under some circumstances, the funds available for attorneys fees.

So too, exposing conflict can impede settlement arrangements that are attractive to class counsel on a number of grounds. Wherever class members are not underwriting the costs of litigation, they might well prefer a larger investment of legal time than their attorney is

inclined or able to provide. For example, if the prospects for prevailing on appeal appear dubious, many plaintiffs will nonetheless see little to lose and everything to gain from persistence. Their views may not find an enthusiastic spokesman in class counsel, who has concerns for his reputation as well as competing claims on his time and his organization's resources to consider.

The obverse situation can emerge in test-case litigation. Once a lawyer has prepared a claim that could have significant legal impact, he may not share some plaintiffs' enthusiasm for settlements promising generous terms for the litigants but little recognition and no precedential value for similarly-situated victims. Like other professionals, class action attorneys cannot make decisions wholly independent of concerns about their careers and reputation among peers, potential clients, and funding sources. Involvement in well-publicized educational reform litigation may provide desirable trial experience, generate attractive new cases, legitimate organizational objectives in the eyes of private donors, and enhance attorneys' personal standing in the legal community. (37) Where such rewards are likely, counsel might tend to discount preferences for a low-visibility settlement, particularly if it falls short of achieving ideological objectives to which he is strongly committed.

2. Ideological Concerns

Almost two decades ago, Justice Harlan's dissenting opinion in NAACP v. Button(38) expressed concerns about ideological conflicts between civil rights lawyers and litigants. At issue in Button was a Virginia solicitation statute that impeded NAACP recruitment of

plaintiffs for school desegregtion suits. The majority held the state unconstitutional as applied. Justice Harlan, joined by two colleagues, would have sustained the state prohibitions. Among other things, Justice Harlan emphasized the plaintiffs' lack of information or control over suits filed in their name and the requirement that NAACP attorneys adhere to National Board policy directives or lose their right to compensation. One such policy resolution mandated that pleadings in all school cases "be aimed at obtaining education on a nonsegregated basis . . . [N]o relief other than that will be acceptable. . . . [A]ll lawyers operating under such rule will urge their client . . . to insist on this final relief." In Justice Harlan's view, an attorney subject to such directives "necessarily finds himself with a divided allegiance--to his employer and to his client--which may prevent full compliance with his basic professional obligations."

What constitutes a lawyer's "professional obligations" under such circumstances remains a matter of considerable dispute. Although there was no evidence in Button that plaintiffs opposed NAACP objectives, more recent desegregation suits suggest that Harlan's concerns were not entirely unfounded. Summoning case histories from Boston, Atlanta, and Detroit, Derek Bell submits that NAACP attorneys' "single-minded commitment" to maximum integration has led them to ignore a shift in priorities among many black parents from racial balance to quality education. (39)

Similar indictments have been or could be made against attorneys in other educational reform contexts. For example, in 1974 parents and guardians brought suit in behalf of all present and future residents

of the Pennhurst, Pennsylvania facility for the retarded. Class counsel, who supported community care, made no effort to expose or espouse the views of parents and guardians preferring institutionalization. (40) After the district court ordered removal of Pennhurst residents to community facilities, a systematic survey of their parents and guardians revealed that only 19% of respondents favored de-institutionalization. (41)

It does not follow, however, that attorneys in these and comparable cases necessarily failed to represent their clients' interests. Much depends on how one defines "the client." As the analysis in Part III will suggest, parents often are not sufficiently informed or disinterested to act as spokesmen for all children who will be affected by a judicial decree. But neither is an attorney with strong prudential or ideological preferences well positioned to decide which class members deserve a hearing and which do not. And one critical problem with existing class action procedures is that they provide no assurance that other institutional participants will raise conflicts that counsel would prefer to ignore.

D. Courts, Opposing Parties, and Dissenting Litigants

Both the federal rules and the due process clause vest ultimate responsibility for insuring adequate representation in the trial judge. (42) To discharge that obligation, he has a broad range of procedural options, explored in some detail below. As a threshold matter, however, what bears emphasis is the court's frequent lack of information--or incentive to demand it--concerning the need to invoke such procedural devices.

An adversarial system of justice presuppposes that the parties will act as the primary sources of factual data. Yet insofar as a judge relies on these participants for evidence of class schisms, he will frequently remain uninformed. For the reasons just noted, it is often implausible to expect counsel or the named parties to expose interests at odds with their own. Other class members might not even know of the litigation, let alone the extent to which their particular concerns have been addressed. For example, plaintiffs in the Pennhurst litigation, most of whom favored institutionalization, had little apparent appreciation of their counsel's insistence on community care alternatives until after the court entered a decree. Even if knowledgeable, dissenters will frequently face the precise common action problem that class procedures seek to address; no single individual perceives a sufficient stake in the outcome to warrant the expense of organizing a constituency and obtaining separate representation. (43) Unless the case is particularly significant or the potential for adequate attorneys fees substantial, a dissenting faction may also have difficulty finding well-qualified counsel to pursue their claim.

So too, in some instances, opposing parties will lack the facts or motive to challenge the adequacy of class representation. To prevent misleading or coercive communication, prevailing doctrine severely limits adversaries' contact with class members, thereby restricting their ability to document disaffection. (44) Even where the likelihood of schisms is patent, defendants may lack sufficient facts to force decertification or subdivision of the class. So too, not all opponents will wish to jeopardize relations with class counsel by challenging their representation. Of course, as noted previously, many defendants will perceive decertification motions as useful tactics in a war of

attrition. But in some cases, opposing parties will see little long-range benefit from exploiting conflicts if the probable consequence is simply a slight delay, fewer plaintiffs, or more attorneys. Depending on their relationships with current class counsel and their probable liability for attorneys fees, defendants may prefer dealing with one rather than multiple adversaries. Moreover, some defendant school officials operating on inadequate budgets may be sympathetic to the named representatives' objectives. (45) If a broad remedial order will give them bargaining leverage with funding sources, such officials might be unwilling to take action that could jeopardize a mutually desired result.

Given these incentive and information barriers, courts that do not undertake independent investigation are often poorly situated to assess the adequacy of class representation. Yet constraints of time and role militate against an activist judicial posture. For many trial courts, the pressures to clear dockets are considerable and the cost of ferreting out conflict substantial. To question the fairness of a settlement proposed by class counsel may require more factual investigation and personal innuendo than trial courts are disposed to supply. As one federal district court has noted, a judge who took seriously his mandate to police settlements would necessarily find himself "in the posture of a 'bad guy.' [Where] [n]one of the class members complained; [and] counsel for the defendant does not complain, [w]hy should [the court] interject himself into the arrangement?"(46) Similarly, in the Los Angeles desegregation case, the state trial judge felt he had no occasion for questioning the adequacy of plaintiffs' representation since their opponents never raised the issue. (47)

Moreover, if finding one set of named plaintiffs and their counsel inadequate does not terminate proceedings, it will likely prolong them. From a trial court's perspective, more is seldom merrier. Multiple representation multiplies problems both administratively and substantively. More parties means more papers, more scheduling difficulties, and more potential for objection to any given ruling or settlement proposal. Increasing the visibility of class cleavages may also increase their intensity, exposing the trial court to greater risks of reversal on appeal. Unsurprisingly, the trial judge handling the Los Angeles school desegregation case responded with less than total enthusiasm to an appellate decision mandating intervention by one disaffected plaintiff group:

> The job is getting to me, in all honesty. Now suddenly to find that I [not only have to] take care of your wants and needs, [but possibly] that I will have to do that with other intervenors . . . My disposition is not exactly the best. (48)

This is not to imply that most trial courts are more concerned with clearing calenders than protecting a class, or that they deliberately overlook potential conflicts. The problem is generally one of institutional rather than individual insensitivity. Certification is the only stage at which the court must confront the adequacy of representation, and that is the time at which conflicts are least visible. Adversarial norms and habits may enhance the likelihood that non-participants' concerns will fall through the cracks. Class counsel can scarcely be objective about the adequacy

of his representation. For tactical, substantive, and psychological reasons, he is likely to sit back and wait for complaints, which may never, or far too belatedly, surface. If the litigants, federal rules, and appellate court decisions demand no ongoing factual scrutiny, trial judges understandably are ill-disposed to provide it. Moreover, even where conflicts are apparent, participants may doubt the utility of addressing them through available procedural devices. It is to that kind of cost-benefit calculation that Part III is addressed.

III. Procedural Mechanisms for Coping with Conflicts: The Practical Limits of Theoretical Alternatives

Confronted with the kinds of conflicts discussed above, courts and counsel have responded with two, not mutually exclusive, strategies. A majoritarian approach is to create opportunities for class members to express their preferences directly, through notice, polls, or public hearings. A pluralist alternative is to have separate factions speak through separate representatives.

Although useful in many instances, neither of these strategies provides anything approaching a full solution to class schisms. A generic weakness stems from the information and incentive structures discussed above. If, as is often the case, participants lack the facts or motive to disclose conflicts and the court is insufficiently informed or inclined to pursue the question sua sponte, then the theoretical availability of such alternatives is irrelevant. Moreover, each device has certain practical limitations that further impair its value in addressing conflicts.

A. The Pluralist Response: Subclasses, Intervention, and Amici Presentations

Once significant class cleavages become apparent, the conventional judicial response is to divide by decree classes that are divided in fact. Subclassing is the preferred alternative if the class divides into discrete identifiable groups, having some "ascertainable characteristic" that explains their common concerns. (49) Where conflicts arise from different preferences that do not track otherwise identifiable constituencies within the class, the court might grant some form of amicus curiae or intervenor status as an alternative or supplement to subclassing. Under the federal rules, judges may recognize intervention either as a matter of right or discretion, and limit intervenors' role as the interests of justice require. (50)

The potential benefits attending independent advocacy are readily apparent. Constituencies whose concerns are antithetical or peripheral to those of class representatives receive a hearing. Such participation may assist courts in formulating remedies that best accommodate all interests affected by judicial decree. Since many civil rights litigators operate under severe resource constraints, the inclusion of additional advocates with independent funding may significantly improve factual deliberations. Particularly in contexts such as school desegregation, where the concept of a litigating amicus first took hold, the contribution by Justice Department attorneys and private practitioners as well as civil rights organizations has been enormous. And insofar as dissenters believe their values have been

advocated forcefully, they may be more supportive of both the process and result of judicial deliberations.

How frequently separate representation will in fact improve or legitimate particular decisions is, however, open to question. Problems of bias, timing, manageability, and expense all render the pluralist model less attractive in practice than in theory.

Since a given constituency's views are still mediated through self-appointed representatives and their counsel, the potential for biased advocacy remains. Certainly the pluralist response cannot fully redress problems arising from attorneys' prudential or ideological concerns. If, for example, separate counsel has substantive commitments to a particular remedial strategy, or personal reasons for opposing a low-visibility settlement, he may consciously or unconsciously shade the choices or explanations put to clients. Given the absence of any adequate mechanisms for assuring accountability between counsel and his constituents, multiplying the number of lawyers may at times simply exacerbate problems of bias.

So too, involvement of separate attorneys can be counterproductive if it provides a composite portrait of membership concerns even less representative than that emerging from class counsel's presentation. Like other pressure groups, litigants may tend to overstate the extent and intensity of their support, and the judge will frequently have no sense of how substantial a constituency each separate counsel represents. Given that would-be intervenors or amici need not voice interests other than their own, their involvement may distort the trial court's perception of aggregate class preferences and

skew settlement negotiations accordingly. This is not, of course, to suggest that separate representation is inadvisable wherever distortion might occur. Excluding some concerned participants solely because others have not stepped forward will often enhance neither the quality nor perceived legitimacy of decision-making. The point, rather, is that where the court is interested in understanding and accommodating the broadest possible range of class preferences, separate representation is not of itself an adequate response.

Related difficulties with the pluralist strategy involve issues of timing. To avoid unnecessary expense and complication, courts certifying diverse classes may resist subdivision at the outset but reserve it as an option if schisms develop. Yet the extent of conflict frequently will not be apparent until the parties propose a settlement or the court enters a remedial order. In the Pennhurst case, for example, one disaffected group did not seek to participate until four years after the suit began, a year after trial, and a month after judgment. Desegregation cases provide comparable illustrations, in which the would-be intervenors sought to reopen issues already--but in their view inadequately--litigated. (51) For courts to deny intervention as untimely and grant only the right to file amicus briefs ill-serves constituencies that did not appreciate the need for full participation until the precise terms of the remedy became apparent. Yet, by the same token, belatedly defining subclasses or allowing intervenors who could upset the proposed disposition is costly to all concerned. Precisely when conflicts are most concrete, the pressures on the parties and courts to overlook them are most intense.

Even where proposals for separate counsel present no difficulties of timing, they may raise questions of manageability. In complex cases with diffuse classes, how many overlapping interests warrant independent advocacy? On that issue, prevailing doctrine is notably closed-mouthed. Federal intervention rules, in granting courts discretion to admit any applicant whose claim involves issues of fact or law "in common" with the principal litigation, subsume a broad universe of claimants. (52) Neither courts nor commentators have supplied much in the way of useful limiting principles. In desegregation cases, judges have focused on whether the prospective intervenor or subclass will make a substantial contribution or merely seek to raise issues that already have been resolved or competently advanced by existing parties. (53) What constitutes "competence" or a "substantial" contribution will often be subject to considerable dispute.

That question becomes particularly sticky when the applicants are plaintiffs whose contentions have been pressed by defendants. Faced with such situations in school cases, courts have divided. In some instances, they have denied intervenor or subclass status to disaffected minority groups on the sole ground that school boards already had raised the same objections. (54) Such reasoning is inadequate in two respects. It overlooks the possibility that many arguments, such as those supporting neighborhood schools or shorter bus routes, may be launched with greater force and credibility by concerned plaintiff parents than recalcitrant defendant school boards. Even were that not the case, such decisions appear strangely insensitive to participatory values and the perceived fairness of judicial processes. Given the premises of our adversarial system, excluding a would-be participant on the theory that opponents have adequately protected his interests seems intuitively unconvincing.

Conversely, decisions mandating full participation for disaffected parties have all too often overlooked problems of manageability. The Los Angeles school desegregation suit is a case in point. Invoking a state statute similar to the federal rules, a California appellate court permitted intervention by an organization advocating neighborhood schools, notwithstanding the trial judge's determination that the group sought to present no new arguments and that additional parties would unduly complicate proceedings. As Steven Yeazell's extensive analysis of that opinion demonstrates, the appellate court's rationale for participation admits of no logical stopping point; virtually anyone interested in intervening should be allowed to do so.(55) Indeed, that seems to have been the lower court's understanding of the decision. Following his reversal on appeal, the trial judge admitted a dissenting school board member and two citizen groups, one of which candidly disavowed having any position regarding any integration plan, but alleged that its members would develop views by the time they got to court. The result was a trial involving as many as 24 to 28 attorneys, with the judge occupying a role he described as "somewhat akin to a trainer in the middle ring of a circus."(56)

The difficulties of conducting reasoned deliberations under such circumstances are self-evident. As one attorney in a civil rights case involving far fewer intervenors put it, "every time someone sneezed, the gesundheits took ten pages of transcript."(57) Although trial courts are empowered to limit intervenors' role, the path of least resistance will often be to allow whatever evidence and argument these parties wish to offer.(58) Moreover, where intervenors enjoy only a limited role, they may feel correspondingly limited obligations to

propose constructive solutions for the problems they identify. Thus, adding participants will at times elongate without significantly improving adjudicative processes.

That observation points up one final weakness in the pluralist response to class conflicts: its expense. Full participation in educational reform litigation can be extraordinarily costly. It took the ACLU years to locate volunteer counsel willing and able to bring the Los Angeles school case, a commitment that ended up spanning a decade.(59) In less celebrated cases, it frequently will prove impossible to attract qualified counsel on a pro bono basis, and at current funding levels, public interest organizations have extremely limited litigation resources. Moreover, the absence of direct statutory authorization of fees for intervenors(60) has undoubtedly affected both the courts' exercise of discretion in inviting separate representatives, and attorneys' responsiveness to requests for assistance.

That is not to imply that such sensitivity is misplaced or regrettable. Presumably even the most fervent defenders of the pluralist approach would concede that at some point the law of diminishing marginal returns renders further participation wasteful as well as unwieldly. In a vast array of adjudicative and administrative contexts we are unwilling to underwrite the costs of flushing out all perspectives. The difficulty, however, is that current class action structures do little to insure the allocation of separate representatives along utilitarian lines. As in other decision-making contexts, the pluralist response biases decision making in favor of those with the organizational acumen and financial resources to make themselves heard.(61) Obvious as this deficiency appears, it

receives virtually no attention among defendants of the pluralist faith in class adjudication. Yet to accept their solution as appropriate in theory implies a strong indictment of class representation in practice. If significant separate interests warrant separate voices, it is hard to justify a structure that supplies them only to those willing and able to pay.

Of course, on one level, that objection simply expresses a problem with civil adjudication generally: a hearing is available, but only at a price. But the critique has special force in educational reform litigation. Under the rules governing those cases, procedures are specifically designed and parties are explicitly obligated to provide adequate representation for those on whose behalf the action nominally proceeds. Moreover, as noted earlier, such litigation typically involves an indeterminacy of relief that makes class sentiment relevant, if not dispositive. Where prevailing doctrine is indifferent between certain remedial options, party preferences are of particular concern. And those preferences are not accurately registered through procedural opportunities dependent on limited private or public interest resources.

Thus, what is ultimately most troubling about the pluralist resonse to class conflict is its failure not only to identify limiting principles but also to confront the manner in which information, incentive, and cost constraints combine to skew representation. In many instances, no participant will have sufficient reason, knowledge or resources to voice interests other than those of named plaintiffs or their counsel. In other, usually well-publicized cases, any number of interested parties might wish a role, although their participation could

impede or distort judicial decisionmaking. While those deficiencies are by no means unique to class action adjudication, their presence counsels some attention to majoritarian alternatives.

B. The Majoritarian Response: Direct Participation Through Plebiscites and Public Hearings

Under the federal rules governing injunctive suits, courts must afford class members notice and an opportunity to be heard before approving a pre-trial settlement and may mandate such notification at other times as a matter of discretion.(62) Soliciting opinions directly from class members can serve two purposes. Through questionnaires ("sampling notice"), or invitations to convey oral or written comments, courts may attempt to assess the extent of conflict and need for separate representation. Alternatively, the expression of class sentiment may allow the court or counsel to gauge support for particular litigation objectives or remedial alternatives. The following discussion focuses on the utility of majoritarian devices in identifying aggregate class preferences. Insofar as membership sentiment serves only to signify a need for independent representatives, its ultimate usefulness is, of course, subject to the limitations analyzed above.

As a means of conveying information to the court and a sense of participation to class members, majoritarian strategies seemingly offer several advantages over pluralist devices. The first concerns expense. Relatively speaking, talk is cheap, at least when it occurs among class members rather than through separate counsel. Even with large classes, notice costs can be minimized through publicity in

central meeting places, and public service announcements by local broadcasters, church groups, and civic organizations. More important, soliciting class preferences directly, rather than through the mediating influence of attorneys or named representatives, may reduce opportunities for distortion. It can also enhance individuals' sense of efficacy and confidence in the decisionmaking process. In practice, however, majoritarian devices are vulnerable to three serious objections. Absent extraordinary expenditures, the views elicited from notice and hearings will frequently be unrepresentative, uninformed, and unresponsive to a range of concerns particularly significant in institutional reform litigation.

To provide meaningful evidence of class preferences, responses to written notice or attendance at open meetings must reflect a fair cross-section of the class as a whole. The scant empirical data available raise significant doubts about how frequently this condition is met. Even in cases affording strong incentives for written response, where class members are notified that they can recover damages merely by mailing a single proof of loss, only 10% to 15% have done so.(63) Absent some efforts to ascertain the representativeness of respondents--efforts that are rarely if ever undertaken in injunctive class actions--the reliability of survey replies is questionable.

So too, although review of the literature discloses no systematic research on turnout at public meetings or settlement hearings, interviews with class action litigators confirm the difficulty of convincing a representative sample of the class to attend. Attorneys who have held public meetings in educational reform cases generally report poor attendance.(64) That community organizers generally

experienced comparable attendance rates during the mid-1960s War on Poverty suggests that the problems of mobilization are deep-seated if not intractable. (65)

Although class members' failure to register dissent has often been taken to denote satisfaction, such inferences are troubling on several grounds. Rarely will most class members have sufficient understanding of the meaning of notice, the positions of counsel, and the remedial alternatives available to make informed decisions about whether or how to respond.

A threshold problem stems from the frequent unintelligibility of formal notices. Particularly in civil rights cases, where many class members' educational background is limited, comprehension may be strikingly low. Even lawsuits involving fewer disadvantaged plaintiffs have confronted severe communication barriers. An illustration outside the educational reform context suggests the extent of the problem. The case involved an antitrust claim against several major drug companies, seeking damages for purchasers of antibiotics. Class members received notices stating that unless they indicated a desire to opt out of the litigation, they would be bound by its result. Of the responses received, "many if not most" evinced some degree of misunderstanding, e.g.:

> Dear Attorney General:
>
> Holy greetings to you in Jesus name. I received a card from you and I don't understand

it, and my husband can't read his. Most of the time all I buy is olive oil for healing oil after praying over it, it is anointed with God's power and ain't nothing like dope.

Dear Sir:

Our son is in the Navy, stationed in the Carribean some place. Please let us know exactly what kind of drugs he is accused of taking.

From a mother who will help if properly informed. (66)

Moreover, written notices and open meetings regarding settlement proposals often fail to convey sufficient facts to permit informed decisionmaking. Once prospects for a happy ending are in view, neither the parties who draft a notice nor the judge who approves it have much interest in highlighting features that might prolong the narrative. The Tucson desegregation illustrates how participants can intentionally or inadvertently mask controversial provisions. Rather than specifying that three schools would be closed under a proposed settlement plan, a feature opposed by a "significant number" of parents, the notice stated only that those schools would "be operated . . . in accordance with [certain options] of the plans submitted to the court on July 17, 1978."(67)

Analogous problems arise in public meetings. Particularly when

class counsel orchestrates the plebiscite on a proposed settlement, the potential for biased presentations is unavoidable. As public choice models amply demonstrate, agenda can determine outcome. Even assuming concerted attempts at objectivity, lawyers may unwittingly shape results through the formulation of issues and the sequence of voting. Neither training nor experience equips most attorneys in the "mechanics of democratic consultation."(68)

In some instances, to be discussed at greater length in Part IV, courts could minimize the likelihood of distortion by appointing a special master to oversee public meetings. But even assuming a wholly neutral orchestration, such meetings are of limited use in eliciting informed preferences. The complexity of the bargaining process and the range of remedial alternatives are often impossible to convey to large groups. Excessive posturing by vocal participants may divert audience attention from difficult tradeoffs that negotiators cannot so readily avoid. Public votes or petition signatures might more accurately reflect peer pressure than reflective judgment. Although mail questionnaires mitigate problems of posturing and peer influence, they can seldom convey enough factual detail to permit rational decisionmaking.

These difficulties, coupled with problems of expense and confidentiality, cut against soliciting class sentiment during the negotiation process. Yet if, as is often the case, class members are invited to register preferences only after a single tentative agreement is put forward, they will have too little appreciation of plausible alternatives to make independent informed judgments. Some individuals may hold unrealistic expectations about the availability of a more

attractive remedial package after trial, appeal, or further bargaining. Others might too readily accept named plaintiff's or counsel's less than disinterested projections of the risks of accepting or refusing particular proposals. And of course, simple plebiscites cannot adjust for differentials in voter comprehension, acuity, or intensity of concerns. As political theorists such as Hanna Pitkin have submitted, the more technical the issue, the less the point in counting noses. (69)

In some instances, class members are uninformed in a still more fundamental sense. Individuals who lack experience with controversial remedial options may tend to fear the worst and vote accordingly. Although empirical evidence is limited, several studies suggest that black families subject to metropolitan busing programs are far more supportive of the concept than the black population generally. (70) So too, a survey of families involved in the Pennhurst litigation found that after their relatives had gone into community facilities, individuals who had strongly opposed such placements were "very happy" with the result. (71) That study also disclosed that much of the opposition to de-institutionalization was attributable to concerns that community-based alternatives were not on solid financial ground, and therefore could not guarantee necessary support services and trained personnel. If only experience will effectively allay such fears, courts and counsel may be tempted to provide it, irrespective of class members' stated preferences.

Moreover, these same illustrations point up a final problem with relying on majoritarian methods in educational reform litigation. Often, eligible voters comprise only part of the class affected by judicial decree, and are insufficiently responsive to benefits that will

redound primarily to others. For example, actions against facilities for the retarded typically proceed "in behalf of" all current and future institutionalized residents "speaking through" their parents or legal guardians. (72) Yet, in point of fact, the latter may be speaking for other personal and family interests as well. Parents' primary fear may be that closure of a centralized state facility, without an adequate community alternative, would force them to assume care of their disabled children, a task for which they lack adequate resources and fortitude. (73) The risks of that event may overshadow evidence suggesting that most of those now committed to institutions would lead fuller lives in less restrictive settings. For a variety of reasons, including the frequent lack of better alternatives, the law generally assumes that families are appropriate spokesmen for their dependents. Abandoning that presumption would be quite costly, in both psychological and financial terms. Yet failing to recognize its limitations in many educational reform cases would be costlier still. To accept plebiscites as determinative of class preferences may ignore the conflicts of interest to which voters themselves are subject.

Even absent such conflicts, eligible voters cannot always adequately represent a class that includes their successors. Minority parents, whose children will bear the immediate consequences of disruptive school closures or white hostility, are poorly situated to speak for future generations. The inequity of busing only blacks is immediately apparent; the principal benefits, in preempting white flight and maintaining an adequate tax base, are by comparison remote and conjectural. So too, a defendant school board's offer to increase dramatically the funds available for ghetto schools may seem attractive to existing class members. Yet from the perspective of future

generations, the "gold-plated school house" without any stable fiscal foundations has far less appeal. In some circumstances, the more volatile the issues and the greater the demand for class participation, the less comfortable we may be in abiding by majority vote.

Recognition of these factors doubtless accounts for many judges' reluctance to demand systematic evidence of class sentiment, or to view it as controlling. Thus, for example, settlement hearings are often pro forma gestures; only where class opposition is overwhelming are trial or appellate courts likely to reject a proposed agreement. Even then, they generally are at pains to emphasize that "vigorous" dissent by "large numbers" of class members does not necessarily render a settlement unfair; no "simple percentages" are determinative. (74)

Although these opinions fail to explain why majority votes should not control in instances of conflict, their reasoning may well rest on one central unarticulated premise. In many institutional reform contexts, we do not believe that those class members able and willing to express their views provide an informed or representative cross-section of all who will be affected by a judicial decree. And if, in the final analysis, courts often are unprepared to defer to majoritarian sentiment, there are obvious reasons not to solicit it. Persuading either the class or the public of the legitimacy of a particular outcome is far more difficult once eligible voters have registered their opposition. From this perspective, the virtues of relying on class counsel as a mediating presence become apparent. Such reliance maintains a convenient legitimating myth of client control and participation, without an inconvenient substantive reality. That we have more frequently employed pluralist than majoritarian responses

to class conficts is least partly, albeit not openly, explained on these grounds. In many instances, we wish to provide some limited channel for class members to express a preference without exposing the limits of our confidence in their judgments.

So too, we might at times hope to avoid underscoring the very constitutional indeterminacy that makes such preferences relevant. Polling the plaintiff class in a school desegregation case raises a number of thorny issues. Why not a survey of non-party sentiment? All the practical deficiencies of majoritarianism just rehearsed suggest that counsel for defendant school boards will not always reflect the true desires of their constituents. That was precisely the claim in the Los Angeles case. Certainly from the standpoint of implementing an effective remedy, these non-party preferences matter as much as those of plaintiffs. Inaccurate assessment of community sentiment could unnecessarily contribute to white flight, and erode support for judicial intervention.

But even assuming a judge could present intelligible choices to a fair cross section of the affected constituencies, the institutional costs of doing so would be considerable. To put courts in the business of reading election returns or survey results on a regular basis triggers questions about whether our counter-majoritarian branch ought to be grappling with these issues in the first instance. Insofar as we believe that courts are appropriately or inescapably enmeshed in educational reform, prudence counsels some restraint in open resort to plebiscites. Although majoritarian sentiment would generally cast more light on remedial alternatives than the constitutional text or latest Supreme Court pronouncement, it is risky for trial judges to

talk of entitlements and follow polls. Thus, as David Kirp has documented, resort to "legalist" analysis rather than empirical data is a common survival strategy by courts enmeshed in volatile school desegregation cases. (75) To preserve the credibility of judicial office, we make some compromises in the techniques available for particular decisions.

IV. Alternatives and Apologia

Politics, by Reinhold Niebuhr's definition, is a realm where ethical and technical issues meet. In that sense, the problem of class action conflicts is eminently political and, to a considerable extent, intractable. For we have no wholly satisfactory answers to either the mechanical or moral questions that such conflicts pose. In practice, our procedural devices suffer from all the weaknesses of pluralist or majoritarian strategies generally. And in principle, our legal doctrines mask fundamental uncertainties about the meaning of representation, the proper scope for paternalism, and the distribution of legal resources. Yet to acknowledge the limits of our technical expertise and ethical certitude is not, of course, to abandon all hope of improvement. From a prescriptive standpoint, the preceding discussion suggests a number of useful adjustments in class action procedures.

As that discussion has relentlessly emphasized, current class action structures make see-no-evil hear-no-evil postures far too attractive. Whatever their nominal responsibilities, courts, counsel, named parties, and class opponents may feel that the real obligation to monitor conflicts lies elsewhere. Courts assign it to attorneys,

attorneys to each other or to dissenting class members, and so on. As a result, diverging preferences may never fully surface, or emerge only belatedly, when it is most costly to cope with them.

In addressing these structural problems, courts and legislatures could consider two sorts of reform. One set of strategies should seek to increase judicial awareness of class schisms at an earlier, more meaningful stage of litigation. A second type of prescription would be directed toward improving courts' responses to such conflict. The central objective of both reform strategies should be to enhance the quality and perceived legitimacy of educational reform litigation. without unduly burdening use of class action procedures. That last qualification bears emphasis, since many cases now brought as class actions could, and presumably would proceed as individual suits if the burdens on courts and counsel became too great. Since, as noted earlier, those now excluded from decision-making would have even fewer opportunities to be heard in private litigation, concerns about chilling class certification should assume special significance.

One potentially promising means of insuring greater judicial sensitivity to conflicts would be to require that trial courts make a factual record concerning representation. Under current procedures, judges address that issue in too perfunctory a fashion at too early a stage in litigation. A more useful inquiry could occur if trial courts, before entering any remedial or consent decree, were obligated to make specific findings of fact as to the representativeness of positions advanced by existing parties. More specifically, the judge should have to determine that a fair cross section of class views has been presented and that no significant constituency has been excluded.

To support its determination, the court should require class counsel, or as suggested below, a special master, to submit statements detailing consultations with class members and any evidence of dissension within the class. In addition, the trial judge's findings should explore any divergence between class sentiment--as expressed in letters, petitions or presentations at settlement hearings--and views espoused by named parties and their counsel. Where indicia of substantial conflict or widespread ignorance among class members were present, or where the financial or ideological interests of attorneys created special cause for concern, the judge would be obligated to specify what steps were taken to canvass class sentiment. In reviewing that record, appellate courts should invoke a more stringent standard than abuse of discretion.

An assessment of trial courts' and counsel's current ability to monitor class preferences suggests a second avenue for reform. At present, Rule 23 contemplates, but fails explicitly to underwrite, an activist posture in securing adequate representation. If we are seriously committed to improving class action structures, courts and counsel require resources commensurate with that responsibility. In particular, judges should have discretion to allocate costs of notice, and to authorize fees for separate counsel and special masters where an equitable resolution of the controversy so demands. What bears emphasis here is the rationale rather than the precise details of any cost-shifting or subsidy formula. The general objective is to provide some corrective to current procedures, which often fail to inform class members of likely dispositions, and which condition separate intervention on willingness and ability to pay.

For example, during remedial deliberations or settlement negotiations, courts could be required to make a finding whether some type of notice to the class would warrant its expense. Among the factors to be considered would be the cost and intelligibility of various means of communication, as well as the likelihood that responses would significantly inform the court's decision-making process. To avoid inhibiting requests for class certification, courts should presumptively allocate notice costs to defendants. (76)

Courts should also enjoy discretion to award partial attorneys' fees to intervenors who are essential to a fair resolution of the proceedings. (77) To be sure, developing standards that would limit the universe of potential claimants in some principled fashion presents considerable difficulties. And the expense of underwriting separate counsel for all those who might desire intervention in educational reform cases would be enormous. Given the problems that courts have already experienced in articulating justifications for excluding intervenors, some screening devices probably are essential. Forcing would-be participants to establish the necessity of their presence and to absorb a portion of their costs at least would provide some crude, albeit imperfect, measure of the significance and intensity of their concerns. Moreover, many legislatures are unlikely to prove receptive to any scheme that provides full reimbursement for several sides of the same lawsuit. Thus, a compromise proposal, allowing for partial awards to those whose participation is essential, is probably the only approach within the realm of political possibility.

Absent statutory authorization or circumstances justifying appointment of separate counsel, trial judges might make greater use

of masters. Especially where the court is interested in information about aggregate class preferences rather than a particular substantive issue, appointment of a neutral expert could be useful. Although explicit statutory recognition of this role for masters would be desirable, and in some state courts essential, the current Federal Rules are broad enough to subsume survey-related functions. Rule 53 authorizes appointment of masters under "exceptional conditions" requiring, for example, special expertise or unusually time-consuming factual inquiries. Many educational reform cases present such circumstances, and masters have been utilized to solicit class preferences through both formal and informal means, as by attending meetings, conducting confidential interviews and undertaking surveys. Given the time, resources, expertise, and explicit responsibility for these tasks, masters could often make a substantial contribution in "unclog[ging] the channels of participation."(78)

The ultimate effect of such procedural reforms is difficult to predict. There remains the possibility that greater reliance on separate counsel or court-appointed masters will simply increase the numbers of non-accountable platonic guardians involved in educational reform litigation. And requiring fact-finders to make more detailed records in support of their conclusions has had mixed success in various administrative and judicial contexts. According to Joseph Sax, "emphasis on the redemptive quality of procedural reforms" in agency environmental hearings is "about nine parts myth and one part coconut oil."(79) Yet while systematic data are lacking, most commentators would probably agree with Richard Stewart's less dire assessment. In his view, forcing the decision-maker to "direct attention to factors that may have been disregarded" has in some instances proved of real prophylactic value.(80)

The Pennhurst case provides a good illustration of the impact such procedural reforms could have on decision-making processes. Had parents of Pennhurst residents received less equivocal notice of the relief sought, they might have become active participants at a much earlier stage. Indeed, even as matters stood, the trial judge had received letters from parents opposed to closure. Under the proposed rule, the court could not have proceeded without some further inquiry into the prevalence of such opposition, which none of the participants had expressed. Since the most cursory investigation would have disclosed a substantial constituency favoring institutionalization, the trial judge would have been obligated to make some response to these parental concerns. A court-appointed master or counsel for disaffected parents might have highlighted the need for persuading families of the merits of community facilities, and could have drawn the court's attention to certain problems in placing the severely retarded in non-institutional settings. Even more important, an attorney or master might have served a useful conciliatory function, by explaining the court's rationale and generally preparing families for the possibility of Pennhurst's closure.

As it was, many parents, including the original named plaintiff, felt that they had been misled by class counsel. (81) Following the district court's closure order, those parents sought to intervene and reopen the trial record. Although the Third Circuit ultimately refused to mandate such intervention, it did require the trial judge to hold individual hearings at which parents could object to community placement. (82) Such opposition, coupled with state resistance, has since severely impeded implementation of the trial court's decree. Since entry of the order, less than 200 of over

a thousand residents have been transferred to non-institutional settings, although most parents of those transferred are pleased with the result.(83) Thus, Pennhurst represents a paradigmatic case in which improved procedures might have improved outcomes. Greater attentiveness to parents' concerns at an earlier stage of the proceedings could well have increased their willingness to accept community placements that now appear beneficial to almost all concerned.

Like Pennhurst, much educational reform litigation ends in accommodations whose merits will not be immediately apparent to all constituencies. The ultimate acceptability of those compromises and of the court's institutional role will depend in some measure on class members' perception that their concerns have shaped the decision-making process. So too, that perception may often be colored by whether a master or separate counsel is available to assist litigants in reconstruing partial defeats as unequivocal victories.

Concededly, none of these proposals--individually or cumulatively--can cope adequately with all class conflicts. But that conclusion, if disheartening, is not necessarily damning. Our other political structures suffer from comparable pluralist or majoritarian weaknesses. Though neither courts, counsel, nor parties will always be inclined or able to protect class interests, we have no reason to expect legislators or bureaucrats to do better. Indeed, the strongest defense of any of our governmental constructs is equally available to class actions. While we cannot depend on disinterested and informed judgment by any single group of institutional participants, we can create sufficient procedural checks and balances to prevent at least the worst abuses.

Moreover, to acknowledge that the formal mandates governing class advocacy promise far more than they deliver does not necessarily indict either the pretense or the reality. No current or hypothesized procedures can guarantee that class interests will always be "adequately represented" or that counsel will single-mindedly pursue his "client's" objectives. But the risks of abandoning either fiction may be too great.

No matter how faulty the enforcement mechanism, such mandates serve important precatory and legitimating functions. Amorphous injunctions concerning client autonomy and adequate representation allow us to affirm each individual's right to be heard without in fact paying the entire price. To give fixed content to those terms might force us toward greater pluralism, in which case we would face certain difficult questions about the distribution of legal resources and the marginal contributions of counsel. Alternatively, we could totter towards majoritarianism, only to confront the awkward fact that paternalism is often offensive in principle but desirable in practice. Like other "white lies of the law" those governing class action conflicts spare us such discomfiting choices by papering over "certain weak spots in our intellectual structure."(84) Given the extraordinary achievements of educational reform litigation, that is a useful, if sometimes unbecoming, role.

FOOTNOTES

1. See L. Graglia, Disaster by Decree (1976); D. Horowitz, The Courts and Social Policy (1977); Hazard, Social Justice Through Civil Justice, 36 U. Chi. L. Rev. 699 (1970); Mishkin, Federal Courts as State Reformers, 35 Wash. & Lee L. Rev. 949, 959-61 (1978).

2. For relatively positive assessments of courts' intervention in institutional reform litigation, see Cavanagh & Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 Law & Soc'y Rev. 371 (1980); Eisenberg & Yeazell, The Ordinary and Extraordinary in Institutional Reform Litigation, 93 Harv. L. Rev. 465 (1980); Fiss Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979). For more critical evaluations, see sources cited in note 1 supra.

3. That is not, however, to imply an unqualified preference for litigation over other, more political forms of civil rights activity. For discussion of the bias toward adjudication among public interest organizations, see, e.g., Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 Stan. L. Rev. 207 (1976). However, as subsequent discussion will suggest, many of the problems presented by educational reform litigation would arise with equal force if the issues were addressed in administrative or legislative, rather than judicial contexts. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1311 (1976); D. Trubeck, Public Advocacy: Administrative Government and the Representation of Diffused Interests, in 3 M. Cappelletti & B. Garth, Access to Justice 447, 464-68 (1979).

4. The analysis does not, of course, purport to reflect an exhaustive survey of all published materials and practitioners in the field. The discussion does, however, draw on a fairly broad variety of judicial opinions, published and unpublished case histories, scholarly articles, and personal interviews. The cooperation of attorneys from the NAACP Legal Defense Fund in New York City was of particular assistance.

5. See Federal Rules of Civil Procedure, Rule 23; Parole Commission v. Geraghty, 445 U.S. 388 (1980).

6. See Weinstein, Litigation Seeking Changes in Public Behavior and Institutions: Some Views on Participation, 13 U.C. Davis L. Rev. 231, 234 (1981).

7. Bell, Serving Two Masters: Integration Interests and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470 (1976); Berger, Away from the Court House and Into the Field: The Odyssey of a Special Master, 78 Colum. L. Rev. 707 (1978); Yeazell, Intervention and the Idea of Litigation: A Comment on the Los Angeles School Case, 25 U.C.L.A. L. Rev. 244 (1977).

8. See, e.g., Calhoun v. Cook, 487 F.2d 620 (5th Cir. 1973), 522 F.2d 717 (5th Cir. 1975) (appeal after remand, discussed in Bell, supra note 7, at 485-87.

9. See G. Orfield, Must We Bus (1978) (discussing Tucson, Arizona, desegregation suit). Interview with Clyde Murphy, attorney, NAACP Legal Defense Fund, in New York City (June 25, 1981) (discussing Austin, Texas, desegregation suit).

10. See Norwalk CORE v. Norwalk Board of Educ., 298 F. Supp. 203, 298 F. Supp. 208 (D. Conn. 1968), 298 F. Supp. 210 (1969), aff'd 423 F.2d 121 (2d Cir. 1970); and Hart v. Community School Board, 383 F. Supp. 699, Supp. 383 F. Supp. 769 (EDNY 1974), aff'd 512 F.2d 37 (2d Cir. 1975), discussed in Berger, supra note 7.

11. Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3rd Cir. 1979), discussed in R. Burt, Pennhurst--A Parable (unpublished manuscript 1981); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

12. Fed. R. Civ. P., Rule 23(c)(3).

13. Hansberry v. Lee, 311 U.S. 32, 42 (1940).

14. See Advisory Committee Note, 39 F.R.D. 100 (1966).

15. See Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev. 810, 808 (1974). See generally, J. Pennock, Political Representation: An Overview, in J. Pennock & J. Chapman, ed. Representation 3, 6-16 (1968).

16. See generally, E. Burke, Reflections on the Revolution in France (1790) and id. Thoughts on the Cause of Present Discontents (1770). For an excellent account of the application of Burkean theories to class representation, see Yeazell, From Group Litigation to Class Action--Part II: Interest, Class, and Representation, 27 U.C.L.A. L. Rev. 1-67 (1980).

17. H. Pitkin, in H. Pitkin, ed. Representation, 1, 17 (1969).

18. Long v. Thornton Township High School District 205, 82 F.R.D. 186 (N.D. Ill. 1979). See generally Degnan, Foreword: Adequate Representation in Class Actions, 60 Calif. L. Rev. 705 (1972).

19. 416 F. Supp. 328 (D. Del. 1976).

20. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

21. Potts v. Flax, 313 F.2d 284 (5th Cir. 1963). See generally Keyes v. School Dist. No. 1, 413 U.S. 189, 195-98 (1973).

22. Cf. Holt v. Sarver, 309 F. Supp. 362, 382-85 (E.D. Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

23. 438 U.S. 265 (1978).

24. Summers, Evaluation and Improving Legal Processes--A Plea for Process Values, 60 Cornell L. Rev. 1, 21-25 (1974); Tribe Structural Due Process, 12 Harv. C.R.C.L.L. Rev. 267 (1975).

25. Kadish, Methodology and Criteria in Due Process Adjudication: A Survey and Criticism, 66 Yale L.J. 319, 346-63 (1957); Michaelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights (pt. 1), 1973 Duke L.J. 1153, 1172-73. But see Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics 1978 Wisc. L. Rev. 30 (challenging the premise that participation in legal proceedings enhances their perceived legitimacy).

26. Burke, "Representative as Trustee", in H. Pitkin, supra note 16, at 170. Concepts of representation generally encompass the notion not only that the agent's acts are binding on the represented party but that they are accepted as such. See Nordlinger, Representation, Government Stability, and Decisional Effectiveness, in J. Pennock & J. Chapman, supra note 15, at 108, 120-21; Griffiths, How Can One Person Represent Another, 34 Aristotelian Society, Supp. 187 (1960).

27. J. Ely, Democracy and Distrust 87 (1980).

28. R. Neely, How Courts Govern America 43 (1981); Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv. L. Rev. 410, 430 (1978).

29. For a description of various statutory proposals, see Wicker, Court Stripping, N.Y. Times, April 24, 1981, at 31, col. 1. Although the Justice Department has not taken a formal position on the merits of those proposals, the current Attorney General has expressed dissatisfaction with courts' "extravagant use of mandatory injunctions and remedial decrees." The New Jurisprudence, 67 A.B.A.J. 1582 (1981) (quoting address of William French Smith before the Federal Legal Counsel).

30. National Association of Regional Medical Programs v. Mathews, 551 F.2d 340, 346 (1976). See also Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969).

31. Developments in the Law--Conflicts of Interest, 94 Harv. L. Rev. 1244, 1449-50, 1453 (1981) and cases cited therein.

32. The trial judge in the Los Angeles school desegregation case believes that plaintiff parents had no real contact with their attorneys and were "totally uninformed" about the litigation. Interview with former Judge Egeley, in San Francisco (June 4, 1981). According to the NAACP attorney representing school desegregation plaintiffs in Pittsburgh, their previous attorney had not communicated with them for almost two years. Interview with James Liebman, NAACP Legal Defense Fund, in New York City (June 26, 1981). In Serrano v. Priest, the decade-old litigation challenging California's school finance system, the named plaintiff's role consisted of signing a few papers. Lubenaw, "The Petition Lawyers," Satur. Rev. 39 (Aug. 26, 1972).8

33. Greenfield v. Villager Industries, Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973).

34. Id., at 831-32.

35. Developments in the Law--Class Actions, 89 Harv. L. Rev. 1270 (1970).

36. The Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. Sec. 1988 (1976) grants courts discretion to award reasonable attorneys' fees to prevailing parties other than the United States in most civil rights actions.

37. B. Weisbrod, J. Handler & N. Komesar (ed.) Public Interest Law 88 (1978); Handler, Public Interest Law: Problems and Prospects, in Law and the American Future 99, 106-08 (M. Schwartz, ed. 1976); Rabin, supra note 3, at 233.

38. 371 U.S. 415 (1963).

39. Bell, supra note 7, at 516.

40. The biases of class counsel are explored in detail in an appellate brief by the Pennhurst Parents-Staff Association challenging the adequacy of named plaintiffs' representation. Brief of Amicus Curiae, in Halderman v. Pennhurst State School & Hospital, 612 F.2d 104 (3rd Cir. 1979). For a more dispassionate account, see R. Burt, supra note 11.

41. D. Keating, J. Conroy & S. Walker, Longitudinal Study of the Court-Ordered Deinstitutionalization of Pennhurst 16 (Oct. 30, 1980) (Temple Universty Institute for Survey Research).

42. Fed. Rules Civ. Proc., Rule 23; Kremens v. Burley, 431 U.S. 019, 135 (1977).

43. Weisbrod, Conceptual Perspective on the Public Interest, in B. Weisbrod, J. Handler & N. Komisar (ed.), Public Interest Law: An Economic and Institutional Analysis 4, 29 (1978). For general discussion of the common action problem, see, e.g., M. Olson, The Logic of Collective Action (1965).

44. See Am. Fin. Sys., Inc. v. Pickrel, 18 Fed. Rules Serv. 2d, 292, 295 (D. Md. 1974); Federal Judicial Center: Manual for Complex Litigation, pt. 1 Sec. 1.41 (1978). DR 7-104 of the ABA's Code of Professional Responsibility prohibits attorneys' communication with opposing parties represented by counsel absent counsel's consent.

45. See, e.g., Borow, Minneapolis, in D. Kirp et al, Judicial Management of School Desegregation Cases (1979); R. Burt,

supra note 11 (describing "friendly" school litigation preceding the main Pennhurst suit); interview with Jan Costello, attorney, Juvenile Justice Legal Advocacy Project, Youth Law Center, in San Francisco (Jan. 17, 1981).

46. Prandini v. National Tea Company, 557 F.2d 1015 (3rd Cir. 1977).

47. Interview with former Judge Egley, in San Francisco (June 4, 1981).

48. "2 New Groups in Desegregation Case," L.A. Times, April 20, 1972, Sec. 2 at col. 5.

49. Bryan v. Pttsburgh Plate Glass Co., 474 F.2d 799, 804 (3rd Cir. 1974). See Developments--Class Actions, supra note 35, at 1482.

50. Intervention may be limited even where it occurs as of right under Fed. R. Civ. P. 23(d)(2) & (3). See generally 3 B. J. Moore, Federal Practice Par. 23.90[2] 2d ed. (1978).

51. Bustop v. Superior Court, 69 Cal. App. 3d 66, 137 Cal. Rptr. 793 (2d Dist. 1977); Jones v. Caddo Parish School Board, 499 F.2d 914, 915 (5th Cir. 1974); Calhoun v. Cook, 487 F.2d 680, 682-83 (Sup. ar 1973).

52. Fed. R. Civ. P. 24(b).

53. See, e.g., Mendoza v. United States, 623 F.2d 1338 (9th Cir. 1980); Hinds v. Rapides Parish School Board, 479 F.2d 762 (5th Cir. 1963); Accord, Calhoun v. Cook 487 F.2d 680 (5th Cir. 1973).

54. Cisneros v. Corpus Christi Indep. School Dist. 560 F.2d 190 (5th Cir. 1977); Bradley v. Millikin, 620 F.2d 1141 (6th Cir. 1980).

55. Yeazell, supra note 7, at 260 n.69 (analyzing Bustop v. Superior Court, 69 Cal. App. 3rd 66, 137 Cal. Rptr. 793 (2d Dist. 1977);

56. "Busing Hearings to Resume: Judge Still Skeptical but Will Hear Board's Case," L.A. Times, Apr. 15, 1977, Sec. 1, at 1, col. 5; interview with former Judge Egley, in San Francisco (June 4, 1981).

57. D. Chambers & M. Wald, Smith v. Offer: A Case Study 47 (unpublished manuscript 1981).

58. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1771 (1975).

59. Orfield, supra note 9, at 376-77.

60. See Manjuano v. Basic Vegetable Products, Inc., 541 F.2d 832, 835 n.6 (9th Cir. 1976), and note 36 supra.

61. See generally T. Lowi, The End of Liberalism (0969); W. Connolly, ed., The Bias of Pluralism (1969); Kariel, The Decline of American Pluralism (1961).

62. Fed. R. Civ. P. 23(d)(3).

63. Simon, Class Actions--Useful Tools or Engines of Destruction 55 F.R.D. 375, 379 (1972); see also Wolfram, The Antibiotics Class Actions, 1976 Am. B. Found. Research J. 253, 281, 286, 335-36.

64. In the Pittsburgh school desegregation case, 25 to 30 individuals out of a class of 2,000 students and 4,000 parents typically attended open meetings. Interview with Jim Liebman, attorney, NAACP Legal Defense Fund, in New York City (June 25, 1981). In a suit against the California School for the Blind, only 14 of some 240 notified parents attended an open meeting, and 10 of those present were named plaintiffs or witnesses already familiar with the litigation.. Interview with Armando Menocal, attorney, Public Advocates, in Stanford, California (February 10, 1982).

65. See K. Clark & J. Hopkins, A Relevant War Against Poverty 119-20 (1968); S. Lazarus, The Genteel Populists 51-52 (1974).

66. Herne & King, "I Am Sorry, But I Cannot Attend Your Class Action," Virginia Law Weekly, Friday, Feb. 4, 1972.

67. Mendoza v. United States, 623 F.2d 1338, 1349-50 (9th Cir. 1980).

68. Edmonds, Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits, 3 Black L.J. 176, 181 (1974).

69. H. Pitkin, supra note 17, at 20; R. Dahl, After the Revolution 67-88 (1970); R. Wolff, The Poverty of Liberalism 35 (1968).

70. For example, in one Gallup Poll asking black respondents which policy they favored, 18% supported "integration even with

long-distance busing," and 14% preferred "minimum integration with short-distance busing," while 25% endorsed voluntary open enrollment with busing, and 33% favored neighborhood schools. Potomac Associates poll conducted by Gallup, reported in Watts and Free, State of the Nation 1974, 109-10. By contrast, surveys of black families in several Florida school districts indicated that only 1/4 of respondents opposed their districts' busing plan and only 1/2 actively disapproved "of the way desegregation has been handled around here." Id. at 414. In Louisville, 61% of black parents favored their busing plan, and 43% felt that the quality of education for black children had improved since busing began; only 1/5 believed it had declined. Hawley & McConahay, Attitudes of Louisville and Jefferson County Citizens Toward Busing for Public School Desegregation, Preliminary Results (Durham, N.C.: Duke University and Louis Harris and Associates, 1976; processed), pp. 4-5.

71. D. Keating, J. Conroy & S. Walker, supra note 41, at 44.

72. See, e.g., Halderman v. Pennhurst State Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977).

73. See D. Keating, J. Conroy & S. Walker, supra note 41, at 3-6 (citing surveys); M. Skelton, Areas of Parental Concern About Retarded Children, 10 Mental Retardation, 1, 38-41 (1972).

74. Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 863 (3d Cir.), cert. denied, 419 U.S. 900 (1974); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1216 (5th Cir. 1978).

75. Kirp, The Bounded Politics of School Desegregation Litigation, 51 Harv. Ed. Rev. 395, 407-08 (1981).

76. In the presumably infrequent cases where a court orders an expensive form of notice prior to a determination of liability, plaintiffs could seek to shift costs to the defendant by making some preliminary showing on the merits. Unless the claim appears insubstantial, defendants should bear notice expenses, given the strong public policies favoring enforcement of civil rights and current statutory provisions allowing prevailing parties to recoup such costs. See note 36 supra.

77. This suggested standard tracks proposals for subsidizing intervenors in agency hearings. See, e.g., Pub. L. No. 93-637, 88 Stat. 2183, Sec. 202(a)(1975), reprinted in 1974 Code Cong. & Ad. News 7216.

78. Kirp & Babcock, Judge and Company: Court-Appointed Masters, School Desegregation and Institutional Reform, 32 Ala. L. Rev. 313, 392 (1981). See Brakel, Special Masters in Institutional Reform Litigation, 1979 Am. B. Found. Research J. 513, 549.

79. Sax, The (Unhappy) Truth About NRPA, 26 Okla. L. Rev. 239, 239 (1973).

80. Stewart, supra note 51, at 1702, 1680 & nns. 524-526 (citing commentary). For an attempt to determine the impact of procedural formality on outcome, see P. Nonet, Administrative Justice (1969).

81. R. Burt, supra note 11, at 128.

82. Halderman v. Pennhurst State Hospital, 612 F.2d 84 (3rd Cir. 1979).

83. R. Burt, supra note 11, at 11.

84. L. Fuller, Legal Fictions 51-52 (1967).